

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1707 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

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1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

GIRISHCHANDRA A PANDYA

Versus

SPEAKER

Appearance:

MR PV HATHI for Petitioner

MR VM PANCHOLI, AGP for Respondent No. 1, 2

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 03/08/1999

ORAL JUDGEMENT

In this petition under Article 226 of the Constitution, the petitioner has prayed for an appropriate relief to quash and set aside the orders dated 8.1.1976 (Annexure "E") passed by the Speaker of the Gujarat State Legislative Assembly and dated 12.12.1985 (Annexure "F/1") also passed by the Speaker rejecting the petitioner's representation against the seniority list of the staff in the Gujarat State

Legislative Assembly. The petitioner has prayed for the substantive relief to direct the respondents to assign the petitioner deemed date of promotion as Superintendent/Section Officer when his junior Mr PN Vakil came to be promoted as Superintendent/Section Officer in the year 1964 and to grant the petitioner all the consequential benefits flowing therefrom. The petitioner has also prayed for a writ to direct the respondent to complete and finalize the work of absorption on the basis of the final gradation list showing the position of the petitioner as on 1.5.1960 in compliance with the provisions of the Re-organisation Act and A.G.S. Rules of 1957 and the Government Circulars in this behalf.

2. The petitioner was initially appointed as a Gujarati Typist in the Saurashtra Legislative Assembly through the Public Service Commission on 21.5.1949. The petitioner was promoted and confirmed as Junior Assistant in March/September, 1956. On 1.11.1956 the petitioner was allocated to the Bombay State where the petitioner was posted in the Legislative Assembly and worked there as Junior Assistant. On 1.11.1957, the petitioner was transferred to the District Veterinary Office at Jamnagar pending final absorption. In February, 1959, the petitioner was transferred to the District Veterinary Office in the Directorate of Agriculture where the petitioner came to be promoted to the higher posts of Senior Clerk/Head Clerk and Office Superintendent. The petitioner was promoted as Office Superintendent in the District Veterinary Office on 1.9.1969. On 10.5.1972 the petitioner was ultimately finally absorbed as Junior Assistant in the Gujarat State Legislative Assembly with effect from 1.11.1956 and on 7.8.1973 the petitioner was granted deemed date of promotion as Senior Assistant with effect from 1.5.1960. The petitioner was promoted as Superintendent in the Gujarat State Legislative Assembly on 26.7.1974. The petitioner filed Special Civil Application No. 277/75 for a writ directing the respondents to restore the petitioner to the same position which the petitioner would have occupied in the Legislature Secretariat as if the petitioner had continued in the service of the Bombay Legislature Secretariat and thereafter the Gujarat Legislature Secretariat all throughout on the basis of his holding the post of Junior Assistant with effect from 1.3.1956 and directing them to give the petitioner the post of Superintendent/Section Officer with effect from 15.6.1964 or such other date when any assistant junior to the petitioner was promoted to the post of Superintendent (redesignated as Section Officer). The petition was

resisted on behalf of the Speaker, Gujarat State Legislative Assembly and by others. After hearing the parties through their learned counsel, this Court (Coram: Mr Justice S.H. Sheth) allowed the petition by judgment and order dated 1.5.1975 and issued a writ in the following terms.

"I, therefore, partly allow the petition, issue a writ of mandamus directing respondent Nos. 1 and 2 to cancel the decision of the Speaker recorded in the Memorandum dated 18th September 1974 in the matter of the petitioner's seniority as a Superintendent in the Legislature Secretariat Department and to arrive at a fresh decision in that matter in light of the observations made in this judgment and in accordance with law. Rule is made partly absolute with no order as to costs in the circumstances of the case."

For arriving at the aforesaid conclusion, the learned Single Judge, inter alia, gave the following reasons particularly observing that the adverse remarks made against the petitioner by the Animal Husbandry Department could not have been taken into account as after those remarks the petitioner was promoted to the higher post of Superintendent and the petitioner was also permitted to cross the Efficiency Bar.

"The reasons stated above make it clear that the Speaker was in error in taking into account the adverse entries made against the petitioner by the Animal Husbandry Department prior to 1970 when he was allowed to cross the efficiency bar and in basing his decision thereon. The promotion of the petitioner to the post of a Superintendent in the Animal Husbandry Department and permitting him to cross the efficiency bar in 1970 have, in my opinion, wiped off those adverse remarks. Therefore, the decision of the Speaker incorporated in the Memorandum dated 18th September 1974, in my opinion, suffers from serious legal infirmity. It cannot be sustained. It however, does not necessarily mean that the petitioner is ipso facto entitled to claim his seniority as a Superintendent from 15th June 1964. In my opinion, the Speaker will have to arrive at a fresh decision in the matter on such material as he has without taking into account in any manner whatsoever the adverse remarks made against the petitioner in the Animal Husbandry Department between 1964 and 1970. In that view

of the matter the petitioner is entitled to partly succeed in this petition."

3. Respondent Nos. 1 and 2 preferred Letters Patent Appeal No. 211 of 1975 which came to be dismissed on 1.12.1975. Thereafter respondent No. 1 passed the impugned order dated 8.1.1976 (Annexure "E") holding that the petitioner did not possess positive merits and was not fit for promotion till 1974 and that the petitioner's request that he should be deemed to have been promoted from June, 1964 could not be granted and that accordingly his placement in the seniority list was made correctly. The petitioner preferred representation before the Governor which also came to be rejected on 30.7.1977. It appears that thereafter the provisional gradation list was published in the year 1982 and the final gradation list was published in the year 1985. The petitioner's representation against his placement in the gradation list of Section Officers (originally Superintendents) was also rejected by the Speaker. Thereafter the petitioner filed the present petition.

4. At the hearing of the petition, Mr Hathi, learned counsel for the petitioner has raised the following contentions :-

- (i) While allowing Special Civil Application No. 277/75, this Court had specifically laid down that for promotion to the post of Superintendent (Section Officer) in the Legislative Assembly, the criteria applicable was seniority-cum-merit. Even then respondent No. 1 has throughout applied the criteria of positive merit as is reflected in the impugned order. The impugned order was, therefore, passed without complying with the mandate of this Court and in fact contrary to the directions given by this Court.
- (ii) This Court had also specifically observed that the adverse remarks made against the petitioner in the Animal Husbandry Department between 1964 and 1970 could not have been taken into account as the petitioner was promoted as Superintendent in the Animal Husbandry Department and was also permitted to cross the Efficiency Bar. Even then the first respondent took the said adverse remarks into consideration.
- (iii) Respondent No. 1 has stated in the affidavit that the petitioner did not show the positive merits and in the affidavit in reply filed on

behalf of respondent No. 1 assertions are made that the first respondent did act in accordance with the directions issued by this Court and the observations made in the aforesaid judgment of the learned Single Judge and the Division Bench and the respondents have not produced any material to show as to on what basis the petitioner was found to be positively unfit as it was only on account of such a finding that the petitioner could have been denied promotion to the post of Superintendent in the relevant period between 1964 and 1974.

(iv) The petitioner could not immediately approach this Court for challenging the impugned order because the petitioner had made representations to the Speaker and had also made representations upon publication of the provisional gradation list which was intimately connected with the impugned order and, therefore, the petitioner was expecting the respondents to reconsider the decision in light of the representation. Even if there be any delay in filing the petition, in view of the fact that the respondents have not complied with the judgment of this Court in letter and spirit, this Court may entertain this petition in the exercise of the jurisdiction of this Court under Article 226 of the Constitution.

5. On the other hand, Mr Pancholi, learned AGP for the respondents has vehemently opposed the petition and has made the following submissions :-

(i) The petition filed in the year 1986 challenges the impugned order of the Hon'ble Speaker passed on 8.1.1976. Therefore, the petition suffers from gross delay, laches and acquiescence.

(ii) The impugned order was passed by the Hon'ble Speaker after considering all the relevant material reviewing the petitioner's performance at the relevant time. Hence, this Court would not sit in appeal over the decision of the Hon'ble Speaker in exercise of the jurisdiction under Article 226 of the Constitution.

6. It is true that prima facie the petition suffers from delay because the impugned order was passed in January, 1976 and the petition came to be filed only in the year 1986. However, in para 12 of the petition the petitioner has sought to explain the delay on the ground

that the impugned order having not complied with the mandamus issued by this Court was a nullity and that the petitioner had made the representation which came to be rejected in the year 1980 and that the provisional seniority list was published in 1982 and final list was published in 1985. The petitioner, therefore, made further representations to reconsider the case and that the petitioner can be given appropriate seniority in the cadre of Superintendents.

7. On the other hand, Mr Pancholi, learned AGP has submitted that the petitioner's placement in the provisional seniority list was merely a reflection of the fact that the petitioner was promoted as Section Officer in 1974 which fact was confirmed by the impugned order dated 8.1.1976 and, therefore, subsequent publication of the provisional or final list could not clothe the petitioner with any further right to challenge the original order of 1976 in the year 1986.

8. There is prima facie some substance in the argument of Mr Pancholi and ordinarily the Court would have been inclined to dismiss the petition on the ground of delay alone. However, in R.S. Deodhar vs. State of Maharashtra, AIR 1974 SC 259 relied upon by Mr Hathi for the petitioner, Their Lordships were pleased to observe as under :-

"The rule which says that a Court may not inquire into belated or stale claims is not a rule of law but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay the Court must necessarily refuse to entertain the petition. The question is one of discretion to be followed on the facts of each case.

It may also be noted that the principle on which the Court proceeds in refusing relief to the petitioner on ground of laches or delay is that the rights which have accrued to others by reason of the delay in filing the petition should not be allowed to be disturbed unless there was reasonable explanation for the delay. It may be noticed that the claim for enforcement of the fundamental right of equal opportunity under Art. 16 of itself a fundamental right guaranteed under Article 32 and this Court which has been assigned the role of a sentinel on the qui viva for protection of the fundamental rights cannot easily allow itself to be persuaded to refuse

relief solely on the jejune ground of laches, delay or the like.

9. Mr Hathi has submitted that same principles would apply when this Court exercises its jurisdiction under Article 226 of the Constitution. It is submitted that the petitioner has already retired in the year 1998 and if the the reliefs prayed for by the petitioner are granted, the claims of any third parties are not likely to be affected. In view of the aforesaid observations of the Apex Court and particularly in view of the fact that this Court had already allowed Special Civil Application No. 277/75 directing the respondents to arrive at a fresh decision in the matter of fixing the petitioner's seniority in light of the observations made in the judgment and in accordance with law, it is necessary to quote the relevant observations from the judgement particularly in respect of the criteria of promotion and also as to which adverse remarks against the petitioner must be required to be ignored by the respondents :-

"The next question which arises thereupon is whether by virtue of the fiction by which the petitioner is deemed to have served the Legislature Secretariat Department all throughout since 1st November, 1956 should he be regarded as having been appointed as a Superintendent in that Department with effect from 15th June, 1964. He can be so regarded if he satisfied the test or criterion laid down for promotion by Rule 138 of the Bombay Civil Services Classification and Recruitment Rules. The criterion, in my opinion, is one of seniority-cum-merit. If, therefore, he was not unfit or unsuitable for being promoted to the post of a Superintendent, he ought to be regarded as having been promoted to the post of a Superintendent with effect from 15th June, 1964."

This Court, therefore, laid down in unmistakable terms that the criteria for promotion is seniority-cum-merit and, therefore, the petitioner's name for promotion to the post of Superintendent at the relevant time i.e. 15.6.1964 could be ignored only if he was unfit or unsuitable for being promoted to the post of Superintendent.

Thereafter as regards the adverse remarks to be ignored, this Court observed as under :-

"The decisions referred to above make it clear

beyond any doubt that if a Government Officer is promoted to a higher post or allowed to cross the efficiency bar after adverse remarks have been made, those adverse remarks lose their potency and value and cannot be taken into account later. It has been argued on behalf of the respondents that the Legislature Secretariat Department is different from the Animal Husbandry Department and that even though the adverse made against the petitioner could not have been taken into account in the Animal Husbandry Department, there was nothing to prevent the Legislature Secretariat Department from taking them into account. I do not think such an argument can be accepted. If the Department which made adverse remarks against the petitioner thought fit not to lay any store by them and promoted the petitioner to the higher post of a Superintendent on the satisfaction of the stiffer criterion and later on permitted him to cross the efficiency bar. I do not think those adverse remarks can be taken into account by any other department in which the petitioner is finally absorbed."

"The reasons stated above make it clear that the

Speaker was in error in taking into account the adverse entries made against the petitioner by the Animal Husbandry Department prior to 1970 when he was allowed to cross the efficiency bar and in basing his decision thereon. The promotion of the petitioner to the post of a Superintendent in the Animal Husbandry Department and permitting him to cross the efficient bar in 1970 have, in my opinion, wiped off those adverse remarks. Therefore, the decision of the Speaker incorporated in the Memorandum dated 18th September, 1974, in my opinion, suffers from serious legal infirmity. It cannot be sustained. It however, does not necessarily mean that the petitioner is in fact entitled to claim his seniority as a Superintendent from 15th June, 196. In my opinion, the Speaker will have to arrive at a fresh decision in the matter on such material as he was without taking into account in any manner whatsoever the adverse remarks made against the petitioner in the Animal Husbandry Department between 1964 and 1970. In that view of the matter the petitioner is entitled to partly succeed in this petition.

I, therefore, partly allow the petition, issue a writ of mandamus directing respondents Nos. 1 and 2 to cancel the decision of the Speaker recorded in the Memorandum dated 18th September, 1975 in the matter of the petitioner's seniority as a Superintendent in the Legislature Secretariat Department and to arrive at a fresh decision in that matter in light of the observations made in this judgment and in accordance with law. Rule is made partly absolute with no order as to costs in the circumstances of the case."

10. The Division Bench also confirmed the aforesaid judgment in the following terms :-

"The petitioner case for promotion having been considered on the extraneous ground of post - 1964 performance, and as the settled legal position in AIR 1970 Supreme Court 2086, even the subsequent adverse remarks having been considered by allowing the petitioner to cross E.B. the order of the learned single Judge is just legal and proper. L.P.A. is therefore dismissed."

11. Now looking to the order passed by the Speaker on 8.1.1976 throughout the terms used by the Speaker are that the petitioner was not positively fit or that the petitioner did not possess in the relevant year the required positive merits for being eligible for promotion as Superintendent. It is thus clear that the observations made by this Court that the criterion for promotion was seniority-cum-merit was given a complete go by and a wrong criterion was applied by respondent No. 1 for rejecting the petitioner's claim for promotion to the post of Superintendent from 1964 onwards. It is also not clear from the order of respondent No. 1 as to how the direction given by this Court for ignoring the adverse remarks for the period between 1964 and 1970 was taken care of by respondent No. 1. In fact, this Court had specifically observed that the adverse remarks made by the Animal Husbandry Department prior to the petitioner's promotion as Superintendent in the Animal Husbandry Department could not have been taken into account. The petitioner was promoted as Superintendent in the Animal Husbandry Department on 1.9.1969. Even then, while rejecting the petitioner's claim for promotion to the post of Superintendent in 1964, 1966 or 1967 and while observing that the petitioner did not possess the required positive merits and was not fit for promotion to the post of Superintendent, respondent No. 1 has not made any reference to any material for coming

to such conclusion. Mr Pancholi, learned AGP would, however, submit that the learned Single Judge had himself clarified that in case of seniority cum merit also mere absence of adverse remarks will not necessarily mean absence of unfitness. Absence of unfitness will have to be ruled out by considering his overall service record. Even so, one cannot overlook the observations made by the learned Single Judge while allowing Special Civil Application No. 277/75 that the petitioner was promoted as superintendent in the Animal Husbandry Department after having been satisfied on the stiffer criterion test as is clear from the observations already quoted hereinabove.

12. In above view of the matter, it will have to be held that the impugned order dated 8.1.1976 passed by respondent No. 1 suffers from the same infirmities with which the earlier order suffered and, therefore, while considering the challenge to the second order which not merely does not comply with the judgment of this Court but also appears to be in defiance of the said judgment of this Court, this Court would not be inclined to reject the petition only on the jejune ground of delay. As observed by the Apex Court, there is no inviolable rule that whenever there is delay the Court must necessarily refuse to entertain the petition but the question is one of discretion to be followed on the facts of each case. The facts pointed out hereinabove and the observations made by this Court on the previous occasion, impel the Court to entertain this petition even though the petition does suffer from some delay.

13. The merits of the challenge to the impugned order have already been discussed while discussing the preliminary contention about delay. It is, therefore, clear that the petition deserves to be allowed as the impugned order suffers from serious infirmities in spite of the previous judgment of this Court. Ordinarily, in such matters, the Court would quash the decision and remand the matter to the authorities for taking a fresh decision. In the facts of this case, however, this Court does not propose to follow that course of action because the petitioner had already approached this Court earlier and obtained a mandamus to that effect and this Court directed respondent Nos. 1 and 2 to arrive at a fresh decision in the matter in light of the observations made in the judgment. Those observations have not at all been complied with but have been given a complete go by. Therefore, this Court would issue a writ directing the respondents to promote the petitioner with effect from 1.6.1969 when the petitioner was admittedly promoted as

Superintendent in the Animal Husbandry Department. Even so, the Court cannot overlook the delay on the part of the petitioner in approaching this Court.

14. Hence, while directing the respondents to consider the petitioner as having been promoted to the post of Superintendent with effect from 1.9.1969, the Court would give the benefit of deemed date of promotion in the cadre of Superintendents only for the limited purpose of pay fixation from 1.9.1969 till the date of filing of the petition i.e. 31.1.1986. Therefore, the petitioner shall not be given the benefit of arrears of difference of salary prior to 1.2.1986 as the petition was filed on 30.1.1986. The petitioner shall, however, be given the benefit of arrears of difference of salary with effect from 1.2.1986 (as the petition was filed on 30.1.1986) till the petitioner's retirement in February, 1988. The petitioner's pensionary benefits shall be recalculated on the aforesaid basis and the petitioner shall be paid all arrears of difference of pension on that basis.

The aforesaid directions shall be complied with within three months from the date of receipt of the writ of this Court or a certified copy of this judgment, whichever is earlier.

15. It is clarified that the deemed date of 1.6.1969 is given to the petitioner only for the aforesaid limited purposes and that the same shall not confer any benefit of seniority for the purpose of promotion to the still higher cadre/s or any other benefit which is not expressly stated in this judgment.

August 3, 1999 (M.S. Shah, J.)

sundar/-